90-1754

Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

CHARLES DEEDS,

Petitioner,

v.

JOE JOHNSON, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Allegedly harassed because of comments on matters of public interest, a public employee found his conditions of work intolerable and submitted his resignation. He sued alleging constructive discharge less than two years before his discharge, but two years and nine days after giving notice of his resignation. Did the courts below err in holding that the cause of action accrued, according to the applicable statute of limitations, on the day the employee gave notice, not on the day his employment was terminated?

THE PARTIES TO THIS PROCEEDING

Charles A. Deeds

Joe Johnson

Aubrey La Fargue

Al Pliodzinskas

All of the above are present or former employees of The City of Houston, a municipality.

The City of Houston.

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THE OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Southern District of Texas were not reported. They are reproduced in the Appendix.

JURISDICTION OF THIS COURT

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered February 7, 1991. The jurisdiction of this court is invoked in accordance with 28 U.S.C. § 1254(1).

STATUTES AND RULES

This case was brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983 asserting violations of rights secured by the First Amendment to the Constitution of the United States.

The First Amendment to the Constitution of the United States states as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983 states as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprива-

tion of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The applicable limitations statute, Texas Civil Practice and Remedies Code § 16.003 states as follows:

(a) A person must bring a suit for trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury, forcible

entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues.

(b) A person must bring suit not later than two years after the day the cause of action accrues in an action for injury resulting in death. The cause of action accrues on the death of the injured person.

STATEMENT OF THE CASE

Charles A. Deeds, hereinafter referred to as "the employee" for clarity, was a chemist employed by the City of Houston.

His federal suit, filed June 20, 1989, alleged he had raised complaints about falsification of data which could create health hazards and had given notice of public employees falsifying time re-

cords to get pay to which they were not entitled.

The employee further alleged that beginning early in 1986, as a result of his reporting the misdeeds, he was subjected by his supervisors to continuing harassment. The supervisors and the municipality were named as defendants in the lawsuit, in which the employee claimed constructive discharge.

The employee submitted a letter of resignation on June 11, 1987, stating that he was being subjected to retaliation for his actions, had not been able to obtain relief through the municipal grievance procedure and was forced to resign effective July 1, 1987.

The suit, thus, was brought less than two years from the undisputed date of the discharge, July 1, but more than two years

after the day the employee gave notice of continuing acts of harassment and his resignation.

The district court granted summary judgment, holding that the Texas two-year statute of limitations, which the parties agreed does apply, accrued on the date of the notice, not of the discharge. The appellate court affirmed.

ARGUMENT

Holding that a cause of action for an injury accrues on the basis of action by the victim, not of the alleged wrongdoer, is a gross misapplication of the principles set forth in Delaware State College v. Ricks, 449 U.S. 250 (1980).

Where there is a continuing injury, a cause of action accrues on each successive day of such injury. The Fifth Circuit refused to distinguish between a case

in which the employer tells an employee he is discharged and the case here, where there is a persistent pattern of conduct culminating in the constructive discharge.

The Fifth Circuit held that "the statute of limitations began to run from the date that Deeds notified his employer of his resignation on June 11, 1987, not on the last day of work, irrespective of continuing wrongful acts of the employer between those dates." Appendix at 5-6. (Emphasis added.)

Summary judgment was rendered solely on the limitations issue. Thus it was never contested that the defendants continued their wrongful conduct to the last day the employee worked. Nor was it contested that the conduct made further employment intolerable.

In effect, the decisions below to punish the employee for the final courtesy of providing notice, rather than walking away, while choosing to ignore wrongful conduct admittedly occurring within the limitations period.

Other circuits have taken a different view of a continuing violation. See, for example, Centifanti v. Nix, 865 F.2d 1422, 1433 (4th Cir. 1989)("[Plaintiff] alleges what is in essence a continuing wrong. His cause of action continues to accrue on each day of the alleged wrong.")

The decision below, in fact, is inconsistent with this court's analysis in Delaware College, supra. In that case, the employer had given specific notice that a professor would be denied tenure, and the cause of action was held to accrue as a result of the denial of tenure, even

though the termination of employment, in accordance with academic practice, was not immediate.

Quoting from Abramson v. University of Hawaii, 594 F.2d 202, 209 (9th Cir. 1979), this court noted "[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful." 449 U.S. at 258. Significantly, in Abramson a tenure denial was held not to constitute the accrual of a cause of action for purposes of limitations where the circumstances indicated a practice of reconsideration. The denial of reconsideration was held to be a separate allegation of wrongful conduct which precluded summary judgment.

In Delaware College, this court held that in order to extend the limitations

period from the time of notice, the employee "should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of employment." 449 U.S. at 257.

The principles of Delaware College thus cannot be squared with the Fifth Circuit's holding that the continuation of the wrongful conduct after the submission of the resignation was of no consequence.

The importance of this case goes beyond the demonstrated inconsistency with other circuits and this court. Holding that a cause of action accrues from the action of the victim, not the wrongdoer, overturns well established legal principles and creates unnecessary confusion. If the operative act in a constructive

discharge case is the employee's subjective knowledge of the ultimate consequences, the line is not drawn by notice of resignation. The action accrues when the employee first knew the cumulative effect of the wrongful conduct was or would be intolerable.

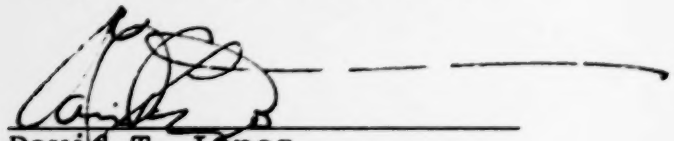
What of an employee who realized that his employer would force him to leave months before the employee actually walked off the job? What scale should a court use to weigh the final straw? What happens if an employee tells his employer that if he does not cease his harassment the employee will be forced to leave? Is the employee then required to leave or to sue within the limitations period if the employer does not stop the harassment?

Failing to give predominant consideration to Constitutional principles, and

allowing individual rights to be denied because of procedural traps which defy established precedent and plain common sense, threatens the credibility of the entire federal judiciary.

This case must be granted plenary review and the error below corrected.

Respectfully submitted,



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\SUPCT\SDEEDS01.PET

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-2591

Charles A. Deeds

Plaintiff-Appellant,

versus

Joe Johnson, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas
(CA H 89 2107)

(February 7, 1991)

Before Johnson, Duhe, and Wiener, Circuit Judges.

Per Curiam:*

Local rule 47.6 provides that "in the

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

case of summary judgment, [when] no genuine issue of material fact has been properly raised by the appellant, and the Court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed without opinion." Pursuant to that Rule, this court affirms the judgment of the district court granting the defendants' motion for summary judgment and dismissing the plaintiff's claim as time-barred. We attach as an appendix to this opinion the order of the district court granting the defendants' motion for summary judgment.

Although we are affirming for the reasons expressed by the district court, we note our disagreement with the way that plaintiff-appellant, Deeds, construed the

district court's opinion. The district court wrote, "plaintiff has failed to allege any discrete acts of discrimination after June 11, 198[7] that would toll the statute of limitations." Deeds complained on appeal that the district court's conclusion "is on its face erroneous as to the facts," and that he had in fact alleged discriminatory acts continuing after June 11, 1987.

That portion of the district court's opinion can be read one of several ways, neither of which requires its reversal. The district court could have meant that

---

2 The district court's order indicates in two separate places that Deeds' letter of resignation was dated June 11, 1985. The order also indicates the correct date of the letter, June 11, 1987, in three separate places. This court is of the opinion that the June 11, 1985, references were inadvertent errors and that the district court was not operating under the erroneous belief as to the date of the resignation letter.

the facts that Deeds alleged did not constitute, as a matter of law, continuing discriminatory acts, and thus not acts that would toll the statute of limitations." Or, the district court could have meant that Deeds allegations of discriminatory acts after June 11, 1987, were insufficient to raise a fact question. Even more plausibly, the district court could have meant that, despite the allegations of continuing discriminatory acts after June 11, 1987, the statute of limitations began to run on June 11, 1987, when Deeds delivered his resignation, not on July 1, 1987, the last day of his employment. Thus, the allegations of continuing employment, which were the same type of acts complained of in his resignation letter, were not acts "that would toll the

running of the statute of limitations." The latter reading of the district court's opinion is clearly supported by the Supreme Court's holding in **Delaware State College v. Ricks,** 449 U.S. 250, 257-58 (1980) (holding that the limitations period commenced when the denial of tenure was communicated to the plaintiff, and not on the final day of employment). **See also Stark v. Dynascan Corp.**, 902 F.2d 549, 551 (7th Cir. 1990) (noting that the limitations period "begins to run from the date that the employee is notified of termination, not from the later date when termination actually occurs"). The same principles apply in a constructive discharge case. Thus, the statute of limitations began to run from the date that Deeds notified his employer of his resignation on June 11, 1987, not on the last

day of work, irrespective of continuing wrongful acts of the employer between those dates.

For the foregoing reasons the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHARLES A. DEEDS,	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. H-89-2107
JOE JOHNSON, ET AL.	§	
Defendants.	§	

ORDER

Pending before the Court in the above referenced cause, grounded in 42 U.S.C. sections 1983, 1985, 1986 and 1988 and in the first and fourteenth amendments, are the following motions:

(1) Defendants Aubrey LaFargue and Al Pliodzinska's motion to dismiss or for summary judgment because the suit is barred by limitations;

(2) Defendant City of Houston's motion to dismiss for defective service under Rule 4(d)(6), Fed. R. Civ. P.;

(3) Defendant City of Houston's motion to dismiss or, alterna-

tively, for summary judgment based upon

a. failure of Plaintiff to plead with particularity a policy made by a policy-making official;

b. a limitations bar; and

c. sovereign immunity from pendent state law claims.

Plaintiff filed this action on June 20, 1989. Because Plaintiff has cured his defective service on the City, the Court finds the second motion is moot. However, after reviewing the record and the applicable law, the Court concludes that this suit is time-barred. Accordingly, the Court concludes that Defendants' motions for summary judgment should be granted.

Plaintiff claims that beginning in 1985 when he was working as a chemist for the City of Houston, he openly cirticized

violations of city procedures and policies and falsification of data, all issues of significant public concern. In retaliation he was transferred against his will and harassed at work by Defendants Pliodzinska and LaFargue, ultimately resulting in his constructive discharge. On June 11, 1985, he wrote a resignation memo to Defendnat Pliodzinskas. Plaintiff characterizes his discriminatory treatment as a continuing violation from early 1986 through June 1987, and he contends that his resignation, a constructive discharge, became effective on July 1, 1987, triggering the running of the statute of limitations at that time. Under his reasoning, he brought suit ten days before limitations expired.

Defendants submit that Plaintiff's cause of action accrued on June 11, 1987,

the date of his resignation memo, and thus he missed the filing deadline by nine days. Plaintiff has not alleged any acts of discriminatory conduct by Defendants after June 11, 1987. Although given an opportunity to counter their arguments, Plaintiff, insisting that the statute should not run until after his last day at work, responded,

> Although the motion is denominated one to dismiss, and alternatively for summary judgment, it is clear that it must be decided under Rule 56, Fed. R. Civ. P., since materials outside the pleadings are submitted with the motion.
>
> However, it is not necessary for plaintiff to offer responsive affidavits or other summary judgment evidence, since on the basis of defendants' own submission the motion is patently without merit.

The Court disagrees. In section 1983 actions, the Court must look to state law

for the applicable statute of limitations, here a two-year period under section 16.003, Texas Civil Practices and Remedies Code. Nevertheless, the question of when a federal cause of action accrues is a matter of federal law. A cause of action under the Civil Rights Act of 1871 accrues when the plaintiff knows or has reason to know of the injury that forms the basis of his suit. Kline v. North Texas University, 782 F.2d 1229, 1232 (5th Cir. 1986); Lavellee v. Listi, 611 F.2d 1129, 1130 (5th Cir. 1980). Under this standard, Plaintiff clearly knew of the nature of his claims, harassment and constructive discharge, at the time when he wrote his resignation memo, dated June 11, 1987. In Delaware State College v. Ricks, 449 U.S. 250 (1980), the United States Supreme Court rejected a brightline, last-day of

work rule for triggering a limitations period in a Title VII and section 1981 employment discrimination case. Instead the Court looked to the date when the allegedly discriminatory decision to terminate was conveyed to the employee by definite notice, the day when defendants "established [their] official position and made that position apparent to" plaintiff. Id. at 262. See also Economu v. Borg-Warner Corp., 829 F.2d 311 (2nd Cir. 1987). In a constructive discharge case, where the employee's act terminates his own employment, the focus is on what a reasonably prudent employee knew and when it became apparent to him. Economu, 829 F.2d at 315; Budzius v. Robert Bosch Corp., 1989 WL 152834 (N.D. Ill Nov. 17, 1989); see also Dumas v. Town of Mount Vernon, 612 F.2d 974, 978 (5th Cir. 1980).

To give a plaintiff control over the limitations period for filing by permitting him the discretion to select the date when his resignation would become effective, i.e. his final work day, and thus prolong the filing period under a constructive discharge theory, is contrary to the purposes underlying a limitations bar.

The continuing violation theory requires a pliaintiff to show a series of related acts, at least one of which falls within the limitations period. Berry v. Board of Supervisors of L.S.U., 715 F.2d 971, 979 (5th Cir. 1983). Plaintiff has failed to allege any discrete acts of discrimination after June 11, 1985 that would toll the running of the statute of limitations. Accordingly the Court finds that this action is time-barred. The

Court therefore

ORDERS that Defendants' motions for summary judgment are GRANTED.

SIGNED this 4th day of May, 1990, at Houston, Texas.

(James DeAnda)
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

Supreme Court, U.S.
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(2)

NO. 90-1754

IN THE

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OCTOBER TERM, 1991

CHARLES DEEDS,
Petitioner

v.

JOE JOHNSON, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

WHETHER THE STATUTE OF LIMITATIONS FOR AN EMPLOYMENT HARASSMENT SUIT BEGINS TO RUN ON THE DATE OF PETITIONER'S RESIGNATION LETTER OR THE DATE THE RESIGNATION LETTER BECOMES EFFECTIVE?

LIST OF ALL PARTIES TO THE PROCEEDINGS

CHARLES DEEDS—Petitioner, former employee of the City of Houston.

JOE JOHNSON—Respondent, former employee of the City of Houston.

AUBREY LA FARGUE—Respondent, present employee of the City of Houston.

AL PLIODZINSKAS—Respondent, former employee of the City of Houston.

THE CITY OF HOUSTON, TEXAS—Respondent, a municipal corporation.

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NO. 90-1754

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OCTOBER TERM, 1991

CHARLES DEEDS,
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JOE JOHNSON, ET AL.,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner has stated the facts accurately; however, the issue currently before this Court is extremely narrow. This is a statute of limitations case where three dates are at issue: (1) June 11, 1987, the date of Petitioner's letter of resignation; (2) July 1, 1987, the effective date of Petitioner's resignation letter; and (3) June 20, 1989, the date this suit was filed in the District Court.

Both the District Court and the Court of Appeals for the Fifth Circuit concluded that in this case the date which activates the two year statute of limitations for an employment harassment suit under 42 U.S.C. §§ 1983, 1985, 1986 and 1988[1] is June 11, 1987, the date of Peti-

1. Apparently before this Court the Petitioner abandons all statutory claims except those under § 1983. See Petition at 1.

tioner's resignation letter. This date was chosen because this document triggers the Petitioner's alleged constructive discharge, the last factually-supported act of harassment contained in Petitioner's pleadings. Petitioner offers no other event or allegation occurring after June 11, 1987 to maintain his theory of continuous harassment or to raise an issue of fact requiring reversal. Federal law mandates that continuous harassment be supported by fact-specific pleadings. Petitioner failed in providing those critical facts in his pleadings.

REASONS FOR DENYING THE WRIT

This case is not one meriting review by this Honorable Court. Petitioners have not established any of the considerations set forth in this Court's Rule 10. The decision rendered by the Court of Appeals is not in conflict with any other decision of another Court of Appeals or of this Court. This case presents no important legal issue that this Court has not decided but should decide. The actions of the lower courts were not of such a nature as to call for an exercise of this Court's power of supervision.

ARGUMENT

THE STATUTE OF LIMITATIONS FOR AN EMPLOYMENT HARASSMENT SUIT UNDER 42 U.S.C. § 1983 BEGINS TO RUN WHEN THE EMPLOYEE HAS NOTICE THAT A DISCRIMINATORY ACT HAS OCCURRED WHETHER THAT ACT IS A DISCRETE INSULAR ACT OR ONE IN A CHAIN OF CONTINUOUS HARASSMENT. THESE ACTS MUST BE PLEAD AND SUPPORTED BY PROOF.

To support a continuous violation theory for an employment harassment suit filed under 42 U.S.C. § 1983, petitioner must show that discriminatory acts occurred until the effective date of his resignation.

Much of the confusion generated by this case comes from two overlapping, yet distinct analyses of the continuous violation theory of employment discrimination. Petitioner is arguing the continuing violation theory of harassment presented in the seminal statute of limitations case, *Delaware State College v. Ricks,* 449 U.S. 250 (1980). The first analysis, and point of departure for judicial review, involves the allegations contained in a particular complainant's pleadings. If no factually-supported allegations are made to show that continuous harrassment occurred until the termination of employment, the Court may not consider them. This was the death knell for Ricks' argument; the allegations which would have extended the statute of limitations were not contained in his complaint. The second analysis of the continuing violation theory is the notice factor integral to a Civil Rights violation: when does the claimant realize that he or she has suffered an injury? This Court, in *Ricks,* looked at the allegations and evidence proffered and concluded that "[i]n light of the unbroken array of negative decisions, the District Court was justified in concluding that the College had established its official position—and made that position apparent to Ricks—no later than June 26, 1974 [the day Ricks was told he would be offered a 1-year "terminal" contract that would expire June 30, 1975]." *Ricks,* 449 U.S. at 262.

In *Ricks,* the two analyses converged and June 26, 1974 became the trigger date because no later date was offered with evidentiary support for acts of discriminatory conduct.

It was also the date when Ricks conclusively knew that he would be denied tenure. Similarly, the analyses for the case before this Court converged and June 11, 1987 became the trigger date because it was the last date offered in Petitioner's pleadings of discriminatory conduct, and it was the date when Petitioner conclusively knew that his rights were allegedly violated through an alleged constructive discharge.

As the Appellate Court has noted in its opinion, there are various ways of interpreting the District Court's opinion, none of which requires reversal. (Petition at A-3). The *Ricks* holding is one: the Court may only review what is presented in the pleadings; if the allegations of discriminatory conduct are not in the complaint, then the Court must look at what facts are presented to determine when the complainant would have knowledge that he had suffered an injury. This is the second and somewhat overlapping view which comes with the notion of when the victim has notice that his rights have been violated; the courts have held that upon acquiring that knowledge the limitations period commences to run. See *Singleton v. City of New York,* 632 F.2d 185, 192 (2d Cir. 1980), *cert. denied,* 450 U.S. 820 (1981).

In applying those two views, the key lies in how this Court construes the time between June 11, 1987 and July 1, 1987, the time between the date of Petitioner's resignation letter and its effective date. Petitioner chose to work until June 30, 1987. Does the mere fact that he continued to be employed demonstrate that he was enduring employment harassment up until that date? Petitioner would have this Court believe, without the support of any allegations or evidence, that because he con-

tinued to work, the employment harassment continued; that because of his mere presence on the jobsite he continued to endure employment harassment. *Ricks* addresses this issue concisely: "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Ricks,* 449 U.S. at 257. Moreover, Petitioner's argument is contrary to the fundamental assumption in the concept of "constructive discharge." In a constructive discharge it is assumed that the Defendant intended to force the Plaintiff to resign, but it is illogical to assume that, having achieved that objective, the Defendant continued the same course of conduct, absent pleading and proof.

The Petitioner in *Ricks* was denied tenure but, as with many other tenure denials, was given an additional one-year contract. *Ricks,* 449 U.S. at 253. Ricks utilized the continuing violation theory of employment harassment and argued that the employment discrimination continued during that last year and until the very last day of employment. *Ricks,* 449 U.S. at 257. However, the District Court determined that the "*only unlawful employment practice alleged*" was the College's decision to deny Ricks' tenure, and that the limitations period for both claims had commenced to run on June 26, 1974, when the President of the Board of Trustees notified Ricks that he would be offered a 1-year 'terminal' contract." *Ricks,* 449 U.S. at 255. (Emphasis added.)

Petitioner's argument here is flawed in the same manner. Petitioner wants to extend the statute of limitations to include the last date of employment because harassment allegedly occurred until the moment that he left. However, as in *Ricks,* Petitioner offers no evidence, no allegations,

no facts, in his pleadings to indicate that the alleged harassment continued after June 11, 1987. The focus must be placed on what is presented in Petitioner's pleadings; if the allegations, supported with appropriate evidence, are not in the pleadings, then those allegations cannot be considered on summary judgment. As in *Ricks,* Petitioner's "argument cannot be squared with the allegations in the complaint." *Ricks,* 449 U.S. at 257.

The second analysis, focusing more on the point in time when a claimant undeniably has knowledge that his rights have been violated, is not the central issue in *Ricks.* Petitioner is correct when he states that to "[h]old . . . that a cause of action for an injury accrues on the basis of action by the victim, not of the alleged wrongdoer, is a gross misapplication of the principles set forth in [Ricks]." (Petition at 6). This statement is correct, but it is Petitioner who is misapplying the *Ricks* holding. Petitioner is confusing the two analyses and forcing the "notice" view into the *Ricks* framework, thereby misinterpreting the Court of Appeals' analysis. Ricks was denied relief because of the allegations, or lack of, in his complaint; as here, Ricks offered no other allegations in his complaint except that he was denied tenure a year before he actually ceased teaching. However, the fact that Ricks was denied tenure a year before he ceased teaching indicates that when he was denied tenure he felt, at that moment, that he had been injured. The injury was the denial of tenure and Ricks then had the burden of seeking redress. If there were other injuries occurring subsequent to the denial of tenure, then Ricks could seek redress after those events, but, as here, none were alleged. Obviously, in order to seek redress, one must have a reason

for doing so, and once that reason is determined, the claimant must take affirmative steps to remedy the injury.

The Court must look at what is in the complainant's pleadings; if the injury alleged is in the nature of a continuous violation, then the Court must look at when the instance of alleged discriminatory conduct occurred because this will indicate when the complainant had notice that he or she had been injured. Here, the last instance of alleged discriminatory conduct was Petitioner's constructive discharge.

Case law in the Fifth Circuit is well-established regarding this issue: "[t]he statute of limitations begins to run from the moment that [a claimant] has suffered an injury or has sufficient information to know that [a claimant] has been injured." *Helton v. Clements,* 832 F.2d 332, 335 (5th Cir. 1987). See also *Dumas v. Mount Vernon,* 612 F.2d 974, 978 (5th Cir. 1980), *McWilliams v. Escambia County School Bd.,* 658 F.2d 326, 330 (5th Cir. 1981); *Clark v. Resistoflex Co., Div. of Unidynamics,* 854 F.2d 762, 766 (5th Cir. 1988); *Jay v. International Salt Co.,* 868 F.2d 179, 181 (5th Cir. 1989). Other circuits are in agreement: *Singleton v. City of New York,* 632 F.2d 185, 192 (2d Cir. 1980), *cert. denied,* 450 U.S. 920 (1981); *Bireline v. Seagondollar,* 567 F.2d 260, 263 (4th Cir. 1977), *cert. denied,* 444 U.S. 842 (1979); *Dixon v. Anderson,* 928 F.2d 212, 215 (6th Cir. 1991); *Nazaire v. Trans World Airlines, Inc.,* 807 F.2d 1372, 1377 (7th Cir. 1986), *cert. denied,* 481 U.S. 1039 (1987).

Consequently, this Court said that "[i]f Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination

of his employment." *Ricks,* 449 U.S. at 257. Absent any allegations of discriminatory conduct up to and at the time of termination, the Court must look at the events chronicled in the complaint and the time they occur to determine when the Complainant had enough notice to know that he or she had been injured. Only the victim will know when he has been injured and only the victim will perceive that his rights have been violated. At that moment in time the victim must take affirmative steps to seek redress for that injury. The State of Texas has given such victims two years from that point in time to seek remedial action. See Texas Civil Practices and Remedies Code, § 16.003.

Petitioner alleges a "persistent pattern of conduct culminating in the constructive discharge." (Petition at 7). Respondents would note that four documented instances of allegedly discriminatory conduct do not a "persistent pattern" make. In Petitioner's Original Complaint, four supportable instances of allegedly wrongful conduct were offered: one transfer and two grievances, in addition to the alleged constructive discharge. The transfer occurred in January, 1986, and the two grievances occurred on August 27, 1985 and November 3, 1986, all very clearly not within the timeframe provided by the statute of limitations.[2]

The last act alleged, the constructive discharge, occurred on June 11, 1987. Petitioner had knowledge of the constructive discharge on June 11, 1987. This is clear

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2. Although the specific dates for the transfer and two grievances, and the date of the resignation letter are not contained in Petitioner's Original Complaint, they are contained in the Record at pages 74-79 and a copy of the Petitioner's resignation letter appears as Appendix B of Appellant's Brief to the Fifth Circuit.

because Petitioner wrote the letter which indicated his desire to resign and that such resignation would be effective July 1, 1987. Under the continuing violation argument, that last act, the constructive discharge, is not within the statute of limitations and, because no other act is offered for the Court's consideration, the alleged continuing violation ceases on that day. Under the notice argument, Petitioner knew that his rights had been allegedly violated on June 11, 1987; he felt he was being driven to resign because the alleged harassment was so egregious. One might even argue under the notice theory that the statute of limitations expired long before because Petitioner had knowledge as early as August 27, 1985, when he filed his first grievance.

Petitioner offers no other allegations of discriminatory conduct. Instead, in Petitioner's Original Complaint, Petitioner makes some rather sweeping assertions of being subjected to unfair criticism and disparagement of his work performance, exposing him to unsafe and hazardous working conditions, unfairly rating him in job performance reviews, imposing unreasonable conditions and unwarranted disciplinary actions upon him, and subjecting him to standards of expected performance substantially different from those of similarly situated employees. However, these allegations are not coupled with any factually specific detail nor shown to have occurred between June 11, 1987 and July 1, 1987, fatally placing Petitioner's claim outside of the applicable statute of limitations. Petitioner's flimsy litany of alleged abuse is not enough to create a "persistent pattern of conduct culminating in the constructive discharge" and therefore insufficient to support a continuous violation theory or to indicate that Petitioner did not know that he was suffering an injury until July 1, 1987.

Petitioner has emphasized the Fifth Circuit Court's statement that "the statute of limitations began to run from the date that Deeds [Petitioner] notified his employer of his resignation on June 11, 1987, not on the last day of work, *irrespective of continuing wrongful acts of the employer between those dates.*" (Petition at 7.) (Petitioner's emphasis.) This statement is clearly read out of context. The Court of Appeals is not stating that continuing wrongful acts occurred, but that even if they had occurred, *because Petitioner had knowledge on June 11, 1987* of the alleged constructive discharge, Petitioner was required to file his suit within the next two years. Even if discriminatory conduct had occurred after that date, because Petitioner possessed the knowledge that he had suffered an injury on that date, the statute of limitations for the constructive discharge began to run on June 11, 1987. (Petition at A-3-6.)

Petitioner misconstrues the case law for the continuing violation theory. *Centifanti v. Nix*, 865 F.2d 1422 (3rd Cir. 1989) involved a disbarred attorney seeking reinstatement. The Third Circuit ruled that because the attorney was suspended from the practice of law, his allegation was that of a continuing wrong. *Centifanti*, 865 F.2d at 1433. Centifanti, the attorney, was denied a means to earn a living without his license to practice law. Petitioner's situation is much different from Centifanti's; Petitioner resigned and could obtain employment elsewhere; Centifanti could literally not practice his profession. Moreover, Centifanti neither resigned nor was constructively discharged; he was disbarred for criminal charges resulting from an assault on his wife. Here, Petitioner resigned allegedly because of intolerable employment harassment. *Centifanti* fails to support Petitioner's argument.

Petitioner also utilizes *Abramson v. University of Hawaii,* 594 F.2d 202 (9th Cir. 1979), a case cited in *Ricks,* but Petitioner is unclear as to what premise this case is meant to support. Respondents agree with the language cited from *Abramson* in *Ricks,* that "[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful." *Ricks,* 449 U.S. at 258. However, *Abramson* is distinguishable from the present case because there the issue was the manner in which tenure denial was implemented. Tenure denials were routinely reconsidered and not deemed final until the President of the University had the opportunity to reconsider and declare that the decision was final. Therefore, the statute of limitations began when, after reconsideration, the President's decision was made to either grant or deny tenure. *Ricks* did not involve such a policy; routine reconsideration was not a common practice as in *Abramson. Abramson* was decided through summary judgment in the lower court and the appellate court determined that there was a fact question at issue, i.e., whether reconsideration was part of the ordinary and generally accepted tenure decision process, which should have precluded the granting of summary judgment. This factual distinction does not alter the *Ricks* holding nor does it add any authority to Petitioner's argument. Petitioner still does not allege any reason for extending the statute of limitations beyond June 11, 1987.

CONCLUSION

This case presents no significant legal issue. This Honorable Court has decided this issue in *Ricks* and there is ample and consistent precedent in applying *Ricks* throughout the Appellate Courts. Petitioner offers no unique question of law but rather muddles the issue by confusing

the dimensions of the continuous violation theory of employment harassment. Petitioner did not provide the factual support to sustain a continuing violation. Further, Petitioner had knowledge of the alleged harassment long before June 11, 1987, as evidenced by the incidents that Petitioner did choose to include in his complaint. The last incident, the alleged constructive discharge, occurred on June 11, 1987. According to case law and in conformance with Texas Civil Practice and Remedies Code § 16.003, the statute of limitations expired June 12, 1989. Petitioner filed suit on June 20, 1989. Therefore, Petitioner's claims are time-barred.

For all of the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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